Supreme Court, U. S.
FILED
JUL 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-109

THE UNNAMED PHYSICIAN,
Petitioner,

v.

MARYLAND COMMISSION ON
MEDICAL DISCIPLINE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

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INDEX

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISION 3

STATEMENT OF THE CASE 3

The Manner in Which the Federal Question Was Raised Below 7

REASONS FOR GRANTING WRIT 7

CONCLUSION 13

TABLE OF CITATIONS

Cases

Cocco v. Maryland Commission on Medical Discipline, 23 Md. App. 173, 84 A.2d 766 (1978) 2

Page

Connally v. General Construction Co.,
269 U.S. 385, 391, 46 S. Ct. 126, 129,
10 L. Ed. 322 11
Kalman v. Walsh, 355 Ill. 341, 189 N.E. 315, 317 10
Lawrence v. Briry, 239 Mass. 474, 132 N.E. 174 10
Olmstead v. United States,
277 U.S. 438, 478 8
Roe v. Wade, 410 U.S. 113, 152 8
Unnamed Physician v. Maryland Commission
on Medical Discipline, ____ Md. ____,
A.2d ____ (1979) 2
Whalen v. Roe, 429 U.S. 589, 599-600 8

Statutes

Annotated Code of Maryland
Article 41, Section 244, *et seq.* 12
Code of Maryland,
Article 43,
Section 130 3,11,12
Section 130A 3
Section 134A 3
U.S.C. 28, Section 1257(3) 2

Constitutional Provisions

Constitution of the United States
Fourteenth Amendment 2,13

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UNNAMED PHYSICIAN, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered on April 23, 1979.

OPINIONS BELOW

The opinion of the Circuit Court for Baltimore County, entered on May 4, 1977, and the judgment of that court, are not officially reported and appear as Appendix A, *infra*, (A. 1).

The opinion of the Court of Special Appeals of Maryland, *Cocco v. Maryland Commission on Med. Discipline*, 23 Md. App. 173, 84 A.2d 766 (1978) appears as Appendix B, *infra*, (A. 5).

The opinion of the Court of Appeals of Maryland, *Unnamed Physician v. Maryland Commission on Medical Discipline*, ____ Md. ____, A.2d ____ (1979) appears as Appendix C, *infra*, (A. 17).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on April 23, 1979. This petition is filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Does a Maryland statute granting a medical disciplinary commission unlimited access to the minutes, notes and records of a confidential intrahospital peer review committee of physicians violate the Fourteenth Amendment of the Constitution of the United States?

2. Is the Maryland statute purportedly regulating the discipline of physicians so vague, indefinite, capricious and contradictory that its enforcement would violate the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION

The Constitutional provision involved is the Fourteenth Amendment of the United States Constitution.

The statute involved is Article 43, Sections 130, 130A and 134A of the Maryland Code, which appears as Appendix D, *infra* (A. 40).

STATEMENT OF THE CASE

The Maryland Commission on Medical Discipline is a State agency responsible for taking disciplinary action against physicians licensed in Maryland when it deems such action to be appropriate.

Pursuant to a complaint received, the Commission instituted an investigation into the medical practice of the Unnamed Physician, Petitioner.

In connection with that investigation, the Commission issued subpoenas duces tecum to Frank W. Baker, Jr., M.D., Arthur E. Cocco, M.D., and Sister Marie Cecilia, O.S.F., to give testimony and produce records of the Medical Executive Committee of Saint Joseph Hospital pertinent to the privileges and practice of the Unnamed Physician at Saint Joseph Hospital, Inc.

Upon advice of counsel, Drs. Baker and Cocco and Sister Marie Cecilia, O.S.F. refused to comply with the aforesaid subpoenas.

At the time of the issuance of the subpoenas, Frank W. Baker, Jr., M.D. was president of the Medical Staff of Saint

Joseph Hospital, Inc., and chairman of the Executive Committee of the Medical Staff. Arthur E. Cocco, M.D. was designated as "Chief of Medicine" and was head of the Department of Medicine and chairman of the Executive Committee of the Department of Medicine.

Saint Joseph Hospital, Inc., has a Medical Staff which has enacted bylaws, and the bylaws have been approved by the Medical Staff of the Hospital and also by the Board of Trustees of the Hospital (the governing body). According to Article VI of the Medical Staff bylaws, one of the standing committees of the Medical Staff is the Executive Committee consisting of officers of the Medical Staff and heads of major clinical departments of the Hospital and other individuals. According to Article V, Section 1, the Hospital is divided into various clinical departments, one of which is the Department of Medicine. Article III (Membership of the Medical Staff), Section 6, "Reduction in Staff Privileges" of the bylaws of the Medical Staff of Saint Joseph Hospital reads as follows:

> "Section 6. *Reduction in Staff Privileges.* Nonconformity to the By-Laws and Rules and Regulations of St. Joseph Hospital and conduct not in keeping with the ethical practice of medicine by any staff member may be brought to the attention of the Executive Committee for appropriate action that may lead to a decision of restriction of privileges, suspension or expulsion. The staff member so affected shall be notified in writing and shall be given the privilege of a hearing before the Executive Committee. Should the staff member not accept the decision of the Executive Committee, he may request a hearing before the medical staff. A two-thirds vote of the medical staff present shall be required for the change in status. If expulsion is the decision of the medical staff, such decision shall be submitted to the governing body for final action."

Certain procedures for hearing and appellate review procedures for members of the Department of Medicine of Saint Joseph Hospital, Inc., were enacted. Pursuant to those procedures a five-member physician *ad hoc* committee was appointed to review the status of privileges of the Unnamed Physician and to evaluate the quality of health care rendered by that physician and to evaluate his qualifications, competence and performance of duties.

The *ad hoc* committee prepared a report dated September 3, 1974, which was forwarded through the Department of Medicine to the Executive Committee of the Medical Staff of the Hospital. The Unnamed Physician, pursuant to the bylaws of the Medical Staff, requested a hearing before the Executive Committee of the Medical Staff, and that hearing was held on March 19, 1975. The purpose of the hearing of March 19, 1975, was to consider the recommendations of the *ad hoc* committee and to evaluate the qualifications, competence and performance of the Unnamed Physician. The March 19, 1975, hearing was not concluded, and no decision was made by the Executive Committee of the Department of Medicine.

The rules and procedures adopted by the Medical Executive Committee represent that the hearing procedures are "privileged and confidential". This representation was made to the attorney for the Unnamed Physician, with the attorney for the Hospital asserting (A) that the participants in the hearing will not discuss the testimony at the hearing or the procedures in general or in particular with any individual; (B) that the proceedings will not be made available to the Medical Society;

(C) that the information produced regarding individual patients shall be absolutely privileged and confidential, and reference will be made to patients' file numbers rather than to the patients' names and addresses.

That pages of the Accreditation Manual for Hospitals of the Joint Commission on Accreditation of Hospitals were attached to the stipulation of facts in the Circuit Court for Baltimore County as evidence by Saint Joseph Hospital, Inc., of the requirements for its evaluation of the quality of medical care and competence of medical practitioners within the Hospital and the general directives of the Joint Commission in this regard.

On October 26, 1976, Respondent petitioned the Circuit Court for Baltimore County for enforcement of the subpoenas. The petition contained no statement as to why the subpoena of the Peer Review Committee's records was necessary, other than that the Unnamed Physician was under investigation. On May 4, 1977, the Circuit Court for Baltimore County entered a judgment ordering enforcement of the subpoenas. Upon appeal to the Court of Special Appeals of Maryland, that Court affirmed the judgment of the Circuit Court for Baltimore County in part and reversed the judgment in part, the reversal involving issues not germane to the federal question. Upon a writ of certiorari, the Court of Appeals affirmed the judgment of the Court of Special Appeals of Maryland in part and reversed it in part, reinstating the Order of enforcement originally entered by the Circuit Court for Baltimore County.

The Manner In Which the Federal Question Was Raised Below.

The federal questions were presented to the trial court by means of a Memorandum on Behalf of the Unnamed Physician arguing the subpoena should not be enforced because it is unconstitutional. (App. E, A. 54). The constitutional claim was dismissed without comment by the trial judge when he ordered the enforcement of the subpoena. (App. A, A. 1). The issue was tendered to the Court of Special Appeals of Maryland as the second Question Presented of the Unnamed Physician's Brief. (App. E, A. 54). The Court of Special Appeals of Maryland brushed aside the constitutional claim, apparently on the erroneous premise that it was neither raised nor decided by the trial court below. (App. B, A. 10). The issue was subsequently tendered to the Court of Appeals of Maryland as the second and third Question Presented of the Unnamed Physician's brief. (App. E, A. 55). The argument was rejected by that Court. (App. C, A. 32-33).

REASONS FOR GRANTING WRIT

Prior to this case, "peer review" was always considered solely for the purpose of educating doctors. It was private so that doctors would feel unfettered in scientific discussion. To improve patient treatment, patients could assume their medical records private unless released by the patient who gave written authority or brought a lawsuit affirmatively making his/her health an issue in litigation. This decision by a court changes the assumptions of the profession and patient retroactively. A doctor participating in "peer review" by this decision finds his discussion, assumed to be private, public and of record retroactively. It is bad public policy, will impede medical progress, and will chill open discussion of colleagues.

Although a right to privacy is not expressly stated in the Constitution of the United States, this Court has long "recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152. This Court has noted that the right of privacy involves at least two different interests: "one in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600. The first interest is involved in the instant case.

The "right to be let alone" has been characterized as "the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting). An individual's right to have information concerning his personal health protected from unwarranted governmental intrusion is within his constitutional right to privacy.

These proceedings do constitute a potential violation of the patients' right to privacy, for their health and treatment will necessarily become subject to the scrutiny of the investigating arm of the Commission, the Commission itself, and even to the Court which will review the propriety of the Commission's actions, at which time the records would become subject to public scrutiny as official court records.

Individuals' right to privacy is not, of course, absolute, but can be subject to governmental regulation and intervention. The standard for permitting such intervention is set forth in *Roe v. Wade, supra*.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest", and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (410 U.S. at 155 (citations omitted)).

Respondent will undoubtedly submit that its statutory responsibility to investigate and discipline physicians is a sufficient "compelling state interest". The contention has some surface appeal, but upon closer scrutiny fails. Respondent's statutory duty to investigate physicians should not give it the unbridled and indiscriminate discretion to subpoena otherwise personal and confidential records, thereby trampling a patient's rights to privacy as well as medical review committees' rights to confidential deliberations. Rather, the subpoena power should only be exercised when it has shown some basis for the belief that the material sought is in some way related to improper actions of a physician.

In this case, the opinion of the Maryland Appellate Court apparently viewed this issue in absolutely unconditional terms; that is, the right of the Respondent to pursue disciplinary proceedings against Petitioner ver us the rights to confidentiality and to privacy surrounding the proceedings of the Hospital Review Committee. The assumption implicit in such a view is that one of these rights must necessarily yield to the other. Although it is true that a decision in favor of the Respondent would necessarily abrogate the physician's right to confidentiality and the patient's right to privacy, the converse is not true. Respondent could fulfill its statutory responsibilities without resort to breaching the confidentiality of the Medical Review Committee of the hospital and/or the patient's right to privacy. The Respondent has made absolutely no showing why it believes that the records of the peer review committee are necessary or relevant. If the conduct of the Petitioner is so

unprofessional as to require disciplinary action by the Commission, that conduct should be capable of detection without compelling participants in a medical review process to divulge comments and criticism made in the belief that they were privileged and confidential and without unilateral abrogation of patients' right to privacy. Throughout these proceedings the Respondent has never alleged that the information sought is in any way related to any misfeasance of which it has knowledge.

The Statute creating the Respondent is so vague, unlimited, indefinite, capricious and contradictory and its meaning so uncertain that its enforcement would violate the due process clause of the Fourteenth Amendment and the patients' right of privacy. The right to practice medicine is a valuable right and, like the right to pursue other professions, such as law, has been held to be a property right within the due process clause of the Constitution. *Lawrence v. Briry*, 239 Mass. 474, 132 N.E. 174. As the Supreme Court of Illinois stated in *Kalman v. Walsh*, 355 Ill. 341, 189 N.E. 315, 317:

> "Revocation of the license of a professional man to practice his chosen profession carried with it not only disgrace and humiliation but deprives him of his means of earning his livelihood. It is the death of his professional life, and there is usually no resurrection after such a death. In a proceeding of this nature due process of law requires a definite charge, adequate notice, and a full, fair, and impartial hearing."

A statute is void for vagueness under the due process clause if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 129, 10 L. Ed. 322. The due process clause in a statute regulating revocation of a professional license therefore requires that the terms of a statute be sufficiently definite, the conduct sought to be proscribed must be clearly delineated, the proper party must be given reasonable notice and have an opportunity to be heard before an unbiased and competent tribunal. The statute in question, Article 43, Section 130, does not meet these requirements.

The conflicting and confusing elements of Article 43, Section 130 include the provisions relating to the confidentiality of certain information, those defining the nature of the right to judicial review, including the admissibility into evidence of "confidential" information, and those relating to the Commission's ability to delegate its power.

The lack of a subsection providing for formalized notice and hearing leaves the physician's procedural rights under the statute unclear. Under Section 130, the Medical and Chirurgical Faculty of the State of Maryland may initiate action, and the Commission may investigate a complaint against a physician coming from any source whatsoever. During this investigation phase, the physician is given no notice of the complaint or investigation and has no way to protect himself from any abuses occurring during the investigative process. Since Section 130 (g) (4) allows the Commission to contract with anyone for investigative or related services, and since there are no limitations placed on this ability to delegate, the increased potential for abuse is obvious. Nothing in the statute prevents the Commission from permitting a wide-ranging fishing expedition into the physician's practice. A physician under investigation could suffer irreparable damage to his reputation and practice

at this stage, even though he may be free of wrongdoing and later cleared of all charges. The statute as written does not give the physician an opportunity to respond to the charges in an informal way, nor does the Baltimore City Chapter of the Medical and Chirurgical Faculty (the investigatory body in the present case) do this as a practical matter.

The statute contains several conflicting sections which make it impossible to understand the nature of the judicial review granted to the physician and the extent to which investigations and reports are to be deemed confidential. All final decisions of the Commission in a contested case are subject to judicial review which is governed by the Administrative Procedures Act, Article 41, Section 244 *et seq.*, Annotated Code of Maryland. Under Article 41, Section 255, the review is based upon the entire record, but new evidence may be submitted. This requirement is in direct conflict with Article 43, Section 130 (q) which also governs the Commission. That section deals with the admissibility into evidence of the Commission's records. It provides that no records of any proceeding before the Commission or any of its investigatory bodies or any order passed by the Commission may be admitted into evidence in *any proceeding*, except by the express stipulation and consent of all parties to the proceeding. Thus, what the statute provides with one hand, it appears to take away with the other. The remedy of judicial review is meaningless unless the record contains all information which was used by the investigatory body in preparing its case against the physician.

The import of this section is unclear since another section of the statute imposes a different requirement of confidentiality. Section 130 (g) states that any investigations and reports made by the investigatory body are to be considered confidential *until final action* is taken by the Commission (emphasis

added). This section indicates that these investigatory materials completely lose their confidential status once the Commission has acted.

The patient's rights to confidentiality may be lost at the expense of the physician's statutory right to appeal if the physician is permitted to admit hospital reports and other patient material into evidence. On the other hand, the physician's right to judicial review could be denied if a patient could unreasonably and arbitrarily cause vital evidence to be excluded from the physician's case or should the patient refuse to testify in the matter. The statutory scheme offers no procedure to resolve the above dilemma.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that this Honorable Court grant this Petition for the reason that enforcement of the subpoena against him would deprive the Petitioner of his rights under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

OPINION AND ORDER

INTRODUCTION

The Maryland Commission on Medical Discipline filed a Petition for Enforcement of Subpoenas to require (1) that records of the St. Joseph Hospital be produced and (2) that Arthur E. Cocco, M.D. and Frank W. Baker, M.D. give testimony in accordance with various subpoenas issued by the Commission. The records and testimony which are the target of the subpoena arose out of a hearing before the Medical Executive Committee of Saint Joseph Hospital.

The Respondents in their answer contend that the matters subpoenaed are privileged and confidential and are neither discoverable nor admissible into evidence.

QUESTION PRESENTED

The question presented is whether the Commission on Medical Discipline has the authority to subpoena records of the St. Joseph Hospital Medical Executive Committee and to compel testimony of members of that Committee.

SUBPOENA POWER

The general subpoena power of the Commission on Medical Discipline is found in Article 43, Section 130 (i) of the Annotated Code of Maryland. That section states:

> "The Commission may issue subpoenas and administer oaths in connection with any investigation, hearing or proceeding under this section."

The Respondents claim that from this broad subpoena power there is carved an exception as to medical review committees[1] as set forth in Article 43, Section 134 A(d). That section states:

> "(d) Confidentiality of proceedings, records of committee. – *The proceedings, records and files of a medical review committee are neither discoverable nor admissible into evidence in any civil action arising out of matters which are being reviewed and evaluated by the committee.* This immunity does not apply to a civil action brought by a party to the proceedings of the review committee and claiming to be aggrieved by the decision of the committee. Also, this immunity does not extend to any records or documents considered by the committee which would otherwise be subject to discovery and introduction into evidence in a civil action." (Emphasis supplied.)

Therefore an exception to the subpoena power of the Commission on Medical Discipline may exist if hearings before that Commission come within the term "civil action" as used in subsection (d) of Section 134A.

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[1] It is not contested that the Saint Joseph Hospital Medical Executive Committee is in fact a medical review committee as defined in Article 43, Section 134A(b) of the Annotated Code of Maryland.

"CIVIL ACTION"

The reported decisions in Maryland offer no guidance as to whether or not "civil action" includes hearings of the Committee on Medical Discipline. Therefore, direction will have to be ascertained from the rulings of other jurisdictions.

In California a proceeding before the Board of Medical Examiners to revoke a physician's license to practice medicine was held not a "civil action" since the board was not a court though it exercises power judicial in nature. *Bold v. Board of Medical Examiners*, 133 Cal. App. 23, 23 P 2d 826 (1933).

The term "civil action" has been defined by many courts and generally it may be said that they are actions between citizens to redress private wrongs and enforce individual rights. *Lee v. Lang*, 140 Fla. 782, 192 So. 490 (1939). Some other judicial definitions are as follows:

> " 'Civil Action' is defined. . .to be. . .an action which has for its object the recovery of private or civil rights or compensation for their infraction." *Farnum's Petition*, 51 W.H. 376.

> "An action is 'civil' when it lies to enforce a private right, or redress a private wrong." *Grueter v. Cumberland Telephone and Telegraph Co.*, C.C., 181 F. 248.

> "The term 'civil action,' as used in statutes has been held to be a proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress of a private wrong." *Thrift v. Thrift*, 30 R.I. 357.

When these definitions of "civil action" are juxtaposed with the hearings and actions taken by the Commission on Medical Discipline one can see they are of a different nature. On the one hand we have the term civil action the purpose of which is the enforcement of individual rights in a court of law or equity or the redress of private wrongs. On the other hand are the administrative hearings of the Commission on Medical Discipline the purpose of which are *inter alia*, to evaluate physicians licensed in this State and to take disciplinary action when the Commission deems such action to be appropriate. No private rights or wrongs are considered and the forum is not that of a court of law or equity.

CONCLUSION

It is therefore the opinion of this Court that the confidentiality afforded by Article 43, Sec. 134 (A) (d) to a medical review committee such as the Saint Joseph Hospital Executive Committee does not apply to the Commission on Medical Discipline.

ORDER

Accordingly, for the reasons stated in the foregoing Opinion, it is this 4th day of May, 1977, by the Circuit Court for Baltimore County,

ORDERED that the Plaintiff's Petition for Enforcement of Subpoenas be and the same is hereby GRANTED.

/s/ _____
H. Kemp MacDaniel
Judge

Copy to:
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APPENDIX B

COURT OF SPECIAL APPEALS OF MARYLAND

The Commission on Medical Discipline of Maryland (the Disciplinary Commission), part of the Department of Health and Mental Hygiene, is authorized, among other things, to discipline a physician for unprofessional conduct by revoking or suspending the physician's license.[1] The Disciplinary Commission is also authorized to

"issue subpoenas and administer oaths in connection

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[1] Md. Ann. Code, art. 43, § 130 (1971 & Cum. Supp. 1977) provides in pertinent part:

"(a). . .The Commission on Medical Discipline of Maryland is hereby established as part of the Department of Health and Mental Hygiene.

"(h) *Powers of Commission; Unprofessional conduct.* —When the Commission has completed its investigation according to the process outlined herein, it may reprimand a physician or place him on probation, revoke or suspend his license, or dismiss the charges against the physician. . . ."

with any investigation, hearing, or proceeding under this section."[2]

Certain medical review committees, composed of members of the medical staff of a hospital, also may discipline a physician for unprofessional conduct by limiting or terminating the physician's staff privileges.[3]

On 19 March 1975, the Medical Executive Committee of St. Joseph's Hospital (the Hospital Review Committee)[4] held a hearing "to evaluate the qualifications, competence and performance" of the appellant Unnamed Physician.[5] The hearing was not concluded and no decision was made.

On 11 October 1976, the appellee, the Disciplinary Commission, in the course of an investigation of a complaint about the medical practices of the Unnamed Physician, issued subpoenas duces tecum to appellant Arthur E. Cocco, M.D., and

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[2] Md. Ann. Code, art. 43, § 130(i) (1971).

[3] Md. Ann. Code, art. 43, § 134 A(b)(3) & (c)(4) (Cum. Supp. 1977); *see* art. 43, § 130 A(a)(1) (Cum. Supp. 1977.)

[4] The Hospital Review Committee, composed of hospital staff members, is a "medical review committee" which may discipline a physician for unprofessional conduct by limiting or terminating the physician's staff privileges.

[5] Md. Ann. Code, art. 43, § 130(g)(1) (Cum. Supp. 1977) provides in pertinent part:

> "All investigations, reports, and recommendations shall be considered confidential until such time as a final action is taken by the Commission."

Accordingly, a physician under investigation remains anonymous until there is final Disciplinary Commission action.

appellant Frank W. Baker, Jr., M.D., among others.[6] The subpoenas required them "to appear" and "to present records of the [Hospital Review Committee] of St. Joseph's Hospital pertinent to the privileges and practice of [the Unnamed Physician] at St. Joseph's Hospital." The doctors refused to comply.

In the Circuit Court for Baltimore County, the Disciplinary Commission filed a petition for enforcement of its subpoenas. In an answer and motion to quash, the doctors asserted that the proceedings and records of the Hospital Review Committee were "privileged and confidential", "neither discoverable nor admissible into evidence", and "otherwise insulated and not available to the Commission." The Unnamed Physician intervened, asserting that art. 43, § 130[7] is vague, contradictory and uncertain and that therefore enforcement of the subpoenas would violate due process.[8]

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[6] Md. Ann. Code, art. 43, § 130 (g)(1) (Cum. Supp. 1977) provides in pertinent part:

> "The Commission shall refer any cases coming to its attention to the appropriate local county society or committee of the Medical and Chirurgical Faculty of the State of Maryland, for investigation and report.... The report shall contain recommendations the investigation reveals may be necessary for adequate disciplinary procedures. The recommendations shall then be considered by the Commission, which....

[7] Md. Ann. Code, art. 43, § 130 (1971 Cum. Supp. 1977).

[8] U.S. Const. amend. XIV, § 1.

In determining whether to enforce the subpoenas, Judge H. Kemp McDaniel considered only one of these contentions. Article 43, § 134A (d)[9] provides in pertinent part:

> "The proceedings, records and files of a medical review committee are neither discoverable nor admissible into evidence *in any civil action* arising out of matters which are being reviewed and evaluated by the committee." (emphasis added).

The trial judge decided that a disciplinary proceeding before the Disciplinary Commission is not a "civil action", On 5 May 1977, he entered an order enforcing the subpoenas. This appeal is from that order.

Maryland courts have recognized that disciplinary proceedings against a professional have the unique purpose of protecting the public from the results of a professional's improper conduct, incompetence or unscrupulous practices.[10] They have consistently differentiated such proceedings from civil and criminal proceedings. They have stated that such a proceeding is

[9] Md. Ann. Code, art. 43 § 134A (Cum. Supp. 1977)

[10] Maryland State Bar Ass'n v. Sugarman, 273 Md. 306, 315-18, 329 A.2d 1, 7 (1974), *cert. denied*, 420 U.S. 974 (1975); Maryland State Bar Ass'n v. Frank, 272 Md. 528, 533, 325 A.2d 718, 720 (1974); Braverman v. Bar Ass'n of Baltimore, 209 Md. 328, 348-49, 121 A.2d 473, 477 (1956); Nelson v. Real Estate Comm'n, 35 Md. App. 334, 339, 370 A.2d 608, 613 (1977).

"neither civil nor criminal in nature"[11] and, more specifically, is not an "action at law"[12] or a "prosecution" or "suit."[13] These courts have consistently declined to extend to judges, lawyers, and real estate brokers under investigation in professional disciplinary proceedings protections available to civil and criminal defendants in court proceedings.[14] Courts in

[11] *In re* Diener, 268 Md. 659, 670, 304 A.2d 587, 594 (1973), *cert. denied*, 415 U.S. 989 (1974); Nelson v. Real Estate Comm'n, 35 Md. App. at 341, 370 A.2d at 613.

[12] Anne Arundel County Bar Ass'n v. Collins, 272 Md. 578, 582, 325 A.2d 724, 727 (1974); Braverman v. Bar Ass'n of Baltimore, 209 Md. at 336, 121 A.2d at 477.

[13] Nelson v. Real Estate Comm'n, 35 Md. App. at 341, 370 A.2d at 613.

[14] *See, e.g.*, Maryland State Bar Ass'n v. Sugarman, 273 Md. at 318-19, 329 A.2d at 6 (attorney's testimony, given after a grant of immunity, may not be used against him in criminal cases but may be used against him in disciplinary proceedings); Anne Arundel County Bar Ass'n v. Collins, 272 Md. at 582, 325 A.2d at 727 (general statute of limitations barring civil actions not bar to disciplinary proceedings against attorney); Maryland State Bar Ass'n v. Frank, 272 Md. at 535, 325 A.2d at 721 (principles of double jeopardy and res judicata which bar certain criminal prosecutions not bar to disciplinary proceedings against attorney); Braverman v. Bar Ass'n of Baltimore City, 209 Md. at 337, 121 A.2d at 477 (formal or technical allegations or descriptions of offense necessary in criminal prosecutions not required in disciplinary proceedings against attorney); Nelson v. Real Estate Comm'n, 35 Md. App. at 342, 370 A.2d at 613 (statute of limitations barring prosecution or suit not bar to disciplinary proceedings against real estate broker).

other states have similarly declined to extend such protections to physicians under investigation in disciplinary proceedings.[15]

We see no difference between protecting the public from improper, unscrupulous or imcompetent practices by judges, attorneys, and real estate brokers and the same type of practices by physicians. Nor are we persuaded by considerations of policy to extend to physician disciplinary proceedings, which protect the rights of the public, the same limitations on discovery applicable in civil proceedings, which enforce private rights.

We agree with the trial court that a disciplinary proceeding before the Disciplinary Commission is not a civil action. Accordingly, art. 43, § 134 A(d) does not preclude the Disciplinary Commission from issuing a subpoena for the proceedings, records and files of the Hospital Review Committee.[16] We shall not, however, affirm.

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[15] *See, e.g.*, Bold v. Board of Medical Examiners, 23 P.2d 826, 827 (Cal. Dist. Ct. App. 1933) (statute of limitations); Blumberg v. State Bd. of Medical Examiners, 115 A. 439, 440 (N.J. 1921) (statute of limitations); State Medical Examining Bd. v. Stewart, 89 P. 475, 477 (Wash. 1907) (statute of limitations); State v. Josefsberg, 81 N.W.2d 735, 740 (Wis. 1957) (laches).

[16] Appellants' other contentions were not decided by the trial court and need not be considered here. Maryland Rule 1085; McCarty v. E. J. Korvette, Inc., 28 Md. App. 421, 441, 347 A.2d 253, 266 (1975). Were we to consider these contentions, we would find them to be without merit.

An appellate court must decide a case according to existing laws even though the trial court's judgment, which was correct when made, must be reversed.[17] An appellate court will apply a change in statutory law made after the trial court's judgment unless vested or accrued substantive rights would be disturbed or unless the Legislature shows a contrary intention.[18]

On 1 July 1977, eight weeks after the trial court's order of 5 May 1977, Md. Ann. Code, art. 43, § 130 A[19] became effective. It provides:

> "§ 130A. Required reports to Commission by hospitals and courts.
>
> "(a) *Reports of denial, limitation or termination of staff privileges for unprofessional conduct; resignation while under formal accusation.* – (1) Each hospital and related institution shall report to the Commission each denial of a physician's application for staff privileges and each limitation, reduction, or termination of previously granted staff privileges if

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[17] Yorkdale Corp. v. Powell, 237 Md. 121, 124, 205 A.2d 269, 271 (1964); Price v. Nesbitt, 29 Md. 265, 265-67 (1868); Firstman v. Atlantic Constr. & Supply Co., 28 Md. App. 285, 295-98, 345 A.2d 118, 124-26 (1975); *see* Gordy v. Prince, 175 Md. 688, 688-89, 7 A.2d 611, 611 (1939).

[18] Yorkdale Corp. v. Powell, 237 Md. at 124, 205 A.2d at 271; Wade v. St. Mary's Indus. School, 43 Md. 178, 181 (1875); *see* Firstman v. Atlantic Constr. & Supply Co., 28 Md. App. at 296-97, 345 A.2d at 125.

[19] Md. Ann. Code, art. 43, § 130 A (Cum. Supp. 1977).

the action results from any of the causes listed in § 130(h) of this article as unprofessional conduct, or any voluntary resignation of a physician while the physician is under formal accusation of activities listed in § 130(h) of this article.

"(2) The report shall be submitted within ten days after the hospital or related institution acts on the staff privileges and shall specify the reasons for the action.

"(3) In no event shall any minutes or notes taken in the course of determining the denial, limitation, reduction or termination of staff privileges be subject to review or discovery by any person.

"(b) *Reports of convictions*. –Each court shall report to the Commission each conviction of a physician for any crime involving moral turpitude within ten days after the conviction.

"(c) *Subpoena power of Commission*. – The Commission may enforce this section by subpoena.

"(d) *Immunity from civil action*. –A person who in good faith provides the information required under this section is immune from civil action for damages resulting from the provision of information.

"(e) *Reports not subject to subpoena or discovery*. –A report made under this section is not subject to subpoena or discovery proceeding in any civil action except proceedings arising out of hearings and decisions of the Commission."

Because this law affects procedural rather than substantive rights[20] and because there is no contrary legislative intent, we shall apply this law.

Article 43, § 130 A(a)(3) expressly precludes the "review or discovery by any person" of the "minutes or notes" of a hospital pertaining to a change in the status of the physician's staff privileges. We must first determine whether the Disciplinary Commission is a "person" within the meaning of § 130 A (a)(3).

The word "person" when used in a statute ordinarily does not include the State or State agencies. A State or State agency, however, may be included in the word "person" if there is a manifest legislative intent that it be so included.[21] In determining this legislative intent, a court must read the words and provisions of a statute in context.[22] In addition, it may consider the legislative history, including committee reports,[23]

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[20] Monell v. IBM, 378 N.Y.S.2d 615, 617 (Sup.Ct. 1976); *see* Beechwood Coal Co. v. Lucas, 215 Md. 248, 254, 137 A.2d 680, 683 (1958); Southerland v. Norris, 74 Md. 326, 328-29, 22 A. 137, 137 (1891); 3 S.Gard, *Jones on Evidence* § 19.13 at 560 (6th ed. 1972).

[21] Harfen v. Mass Transit Admin., 277 Md. 399, 408, 354 A.2d 817, 823-24 (1976); Huffman v. State Roads Comm'n, 152 Md. 566, 584-85, 137 A. 358, 365 (1927).

[22] Schweitzer v. Brewer, 280 Md. 430, 438, 374 A.2d 347, 352 (1977); Walker v. Montgomery County, 244 Md. 98, 102, 223 A.2d 181, 183 (1966); Wilson v. State, 21 Md. App. 557, 567-68, 321 A.2d 549, 555 (1974).

[23] Blumenthal v. Clerk of the Circuit Court, 278 Md. 398, 404, 365 A.2d 279, 283 (1976); Public Service Comm'n v. Sun

and the purpose of the statute.[24] Finally, a court should reconcile and harmonize parts of a statute if possible.[25]

The parts of art. 43, § 130 A(a) are interrelated. Subsection (a)(1) requires that hospitals make certain reports to the Disciplinary Commission. Subsection (a)(2) specifies the time of filing and content of the required report. Thus, the context of subsection (a)(3) requires it to be read as describing material which shall neither be included in the report nor otherwise made available to the Disciplinary Commission.

The legislative history of art. 43, § 130A (Senate Bill 263)[26] shows that, as originally proposed, that Bill did not prohibit review or discovery of a hospital's minutes or notes concerning the status of a physician's staff privileges. A Senate Finance Committee Report, dated 28 February 1977, recommended, among other things, that the Bill be amended to include such a prohibition and that the Bill as amended be enacted. The report described the purpose of the proposed legislation as follows:

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[23] Continued
Cab Co., 160 Md. 476, 481, [West v. Sun Cab Co.] 154 A. 100, 103 (1931); Becker v. Crown Central Petroleum Corp., 26 Md. App. 596, 608-10, 340 A.2d 324, 331-32 (1975).

[24] Fairchild Indus. v. Maritime Air Serv., Ltd., 274 Md. 181, 185-86, 333 A.2d 313, 316 (1975); Sanza v. Md. Bd. of Censors, 245 Md. 319, 340, 226 A.2d 317, 328 (1967); Becker v. Crown Central Petroleum Corp., 26 Md. App. at 608, 340 A.2d at 332.

[25] Holmes v. Criminal Injuries Compensation Bd., 278 Md. 60, 66, 359 A.2d 84, 88 (1976); Moaney v. State, 28 Md. App. 408, 420, 346 A.2d 466, 474 (1975).

[26] Enacted as ch. 173, 1977 Md. Laws.

> "The bill provides a means by which the Commission on Medical Discipline can learn of, and review each denial or reduction of a physician's staff privileges, and other occurrences of unprofessional conduct. *As amended, the bill also safeguards the rights of the accused by denying discovery of pertinent notes regarding the investigation of a physician.*" (Emphasis added.)

The Bill was enacted as amended.

This history establishes that the purpose of subsection (a)(3) is to protect an accused physician from the disclosure of certain materials. To accomplish that purpose fully, subsection (a)(3) must be read as excluding minutes or notes concerning the status of a physician's staff privileges from the material which a hospital is otherwise required to make available to the Disciplinary Commission, a body authorized to impose sanctions upon a physician for unprofessional conduct.

Thus the context, the legislative history, and the purpose of art. 43, § 130 A(a)(3) establish a manifest legislative intent that the Disciplinary Commission be included in the word "person." We now consider the relation between that provision and other parts of the statute.

Article 43, § 130(i) authorizes the Disciplinary Commission to issue subpoenas. It does not restrict the type of material which a hospital may be required to produce. Article 43, § 130 A(c), also authorizes the Disciplinary Commission to issue subpoenas. Article 43, § 130 A(a)(3), however, restricts the type of material which a hospital may be required to produce by excluding "minutes or notes." That section provides that "[i]n no event" shall those "minutes or notes" be

made available to the Disciplinary Commission. Under these circumstances, in order to harmonize and reconcile these three provisions, art. 43, § 130 A(a)(3) must be read as restricting the Disciplinary Commission's authority to compel the production of "minutes or notes," not only under art. 43, § 130 A(c), but also under art. 43, § 130(i). Accordingly, the Disciplinary Commission cannot subpoena the Hospital Review Committee's minutes or notes.

The order of the trial court enforced the Disciplinary Commission's subpoenas which required the production of "records" of the Hospital Review Committee concerning the status of staff privileges of the Unnamed Physician. There was no exclusion of "minutes or notes." To this extent, these subpoenas are not in accordance with existing law.

As a matter of policy, agency subpoenas should be enforced to the extent they are in accordance with law.[27] Under appropriate circumstances, trial courts may modify subpoenas issued by administrative agencies.[28] Accordingly,

[27] *See* 5 U.S.C.A. § 555(d) (1977); 1 F. Cooper, State Administrative Law 299 (1965).

[28] FCC v. Cohn, 154 F.Supp. 899, 911-13 (D.S.D.N.Y. 1957); *see*, Overby v. United States Fidelity and Guaranty Co., 224 F.2d 158, 163-64 (5th Cir. 1955); NLRB v. Anchor Rome Mills, 197 F.2d 447, 449-50 (5th Cir. 1952); *In re* Grand Jury Subpoena, 203 F. Supp. 575, 580 (D.S.D.N.Y. 1961).

we shall reverse the trial court's 5 May 1977 order and remand the case for further proceedings in accordance with this opinion.

JUDGMENT REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.

APPENDIX C

COURT OF APPEALS OF MARYLAND

The primary question presented in this case is whether the proceedings, records and files of a medical review committee are protected by statute from the subpoena power of the Commission on Medical Discipline. We shall examine certain sections of the Maryland Code (1957, 1971 Repl. Vol., 1978 Supp.), Article 43, to determine if the legislative intent and answer to this question is manifest.

Section 130A establishes the Commission on Medical Discipline of Maryland (the Commission) as the agency of the Department of Health and Mental Hygiene charged primarily with the supervision and control of physicians. Section 130(h) sets forth eighteen (18) separate grounds upon which the Commission may discipline a physician. Section 130(i) empowers the Commission to issue subpoenas and administer oaths in connection with any investigation, hearing or proceeding. Section 130(j) entitles any physician whose case is referred to the Commission to appear with counsel at any scheduled hearing. Section 130(q) forbids the record of Commission

proceedings to be admitted into evidence in any proceeding, civil or criminal, except by the express consent of the parties.[1] Section 130(r) provides that no member of the Commission, no complainant or investigator shall be liable for his participation in prosecution of the complaint if such person acted without malice.[2]

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[1] Section 130(q):

(q) *Admissibility in evidence of Commission's records.* – The records of any proceeding before the Commission or of any of its investigatory bodies or any order passed by the Commission may not be admitted into evidence in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible.

[2] Section 130(r):

(r) *Exemption of Commission members and others from civil liability.* – A member of the Commission and any person who makes a complaint to the Commission or who investigates or prosecutes the complaint on its behalf is not liable to any person in any civil proceeding on account of having made the complaint, investigated the complaint, prosecuted the complaint, heard the complaint or acted upon the complaint, provided that such member of the Commission or other person enumerated herein did not act with malice.

In 1976, the General Assembly amended Article 43 by adding § 134A which permits a hospital (and other providers of health care) to establish from its medical staff, a medical review committee. Such committee may also discipline a physician for unprofessional conduct by limiting or denying him staff privileges. Section 134A (d) is entitled "Confidentiality of proceedings, records, and files of committee," and provides:

> The proceedings, records, and files of a medical review committee are neither discoverable nor admissible into evidence in any civil action arising out of matters which are being reviewed and evaluated by the committee. This immunity does not apply to a civil action brought by a party to the proceedings of the review committee and claiming to be aggrieved by the decision of the committee. Also, this immunity does not extend to any records or documents considered by the committee which would otherwise be subject to discovery and introduction into evidence in a civil action.

Section 134A (e) provides:

> (3) *Immunity from liability for damages.* – A medical review committee, individual members of a committee, or any person (1) providing information to, (2) participating in, or (3) contributing to the function of a committee are immune from liability for damages from their activity if their actions are taken in good faith and within the scope of the committees' jurisdiction.

Under this state of the law, the following controversy arose between the medical review committee of Saint Joseph

Hospital, Inc. (Hospital Committee) and the Commission. In September of 1974, this Hospital Committee received a report from an ad hoc committee of the medical staff evaluating the qualifications, competence, and performance of duties of the Unnamed Physician (Physician). The Physician requested a hearing before the Hospital Committee which was held on March 19, 1975. However, the hearing was not concluded and no decision was made.

On October 11, 1976, pursuant to an investigation into the medical practice of the Physician, the Commission issued subpoenas duces tecum[3] to Frank W. Baker, Jr., M.D., Arthur E. Cocco, M.D. and Sister Marie Cecilia, O.S.F.[4] to give testimony and produce the records of the Hospital Committee pertinent to the privileges and practice of the Physician at St. Joseph Hospital, Inc. They refused to comply.

On October 26, 1976, the Commission filed a petition to enforce the subpoenas in the Circuit Court for Baltimore County. In their answer and motion to quash, the physicians[5]

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[3] Code, Art. 43, § 130(i) (1957, 1971 Repl. Vol, 1978 Supp.) provides:

> *Subpoenas; oaths.* – The Commission may issue subpoenas and administer oaths in connection with any investigation, hearing, or proceeding under this section.

[4] Dr. Baker is president and chairman of the executive committee of the medical staff. Dr. Cocco is chairman of the executive committee of the department of medicine; Sister Cecilia is the president of Saint Joseph Hospital, Inc.

[5] Sister Cecilia was not a party to this action since the parties agreed that the information sought was under the control of the doctors.

contended that under § 134A(d), the proceedings, records and files of the Hospital Committee were protected from discovery by the Commission. The Physician intervened, contending that the statute authorizing the issuance of the subpoenas, § 130, is unconstitutionally vague under the United States Constitution, [6] the contention being that the failure of the statute to provide for formalized notice and hearing leaves the physicians's procedural rights unclear. The trial court ruled that a disciplinary proceeding before the Commission is not a "civil action" within the meaning of § 134A(d) and that therefore the subpoenaed materials are not protected from discovery. Accordingly, the court entered an order to enforce the subpoenas on May 4, 1977.

On appeal, the Court of Special Appeals agreed with the circuit court that a proceeding before the Commission is not a "civil action" within the ambit of the statute. *Cocco v. Md. Comm'n on Med. Discipline*, 39 Md. App. 170, 384 A.2d 766 (1978). The appellate court, however, did not affirm the judgment below; that court recognized that Art. 43, § 130A,[7] which became effective eight weeks after the entry of the enforcement order, must also be considered in the resolution of the issue. *Id.* at 174-75. The court found that § 130A (a) (3) expressly precludes the discovery of any "minutes or notes" and held that all of the material subpoenaed by the Commission, with the exception of any "minutes or notes" of the Hospital Committee, must be produced. *Id.* at 176-78. The court reversed and remanded the case for further proceedings in

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[6] U.S. Const., amend. XIV, § 1.

[7] Code, Art. 43, § 130A (1957, 1971 Repl. Vol., 1978 Supp.) provides [emphasis supplied]:

accordance with its opinion. *Id.* at 179. Upon petition of the Physician, we granted certiorari to consider whether the proceedings, records, and files of the Hospital Committee could be subpoenaed by the Commission.

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[7] Continued

Required reports to Commission by hospitals and courts.

(a) *Reports of denial, limitation or termination of staff privileges for unprofessional conduct; resignation while under formal accusation.* –

(1) Each hospital and related institution shall report to the Commission each denial of a physician's application for staff privileges and each limitation, reduction, or termination of previously granted staff privileges if the action results from any of the causes listed in § 130(h) of this article as unprofessional conduct, or any voluntary resignation of a physician while the physician is under formal accusation of activities listed in § 130(h) of this article.

(2) The report shall be submitted within ten days after the hospital or related institution acts on the staff privileges and shall specify the reasons for the action.

(3) *In no event shall any minutes or notes* taken in the course of determining the denial, limitation, reduction or termination of staff privileges *be subject to review or discovery by any person.*

(b) *Reports of convictions.* – Each court shall report to the Commission each conviction

The Physician contends that a proceeding before the Commission is a "civil action" as that term appears in § 134A(d) and that therefore the subpoenaed materials are not discoverable. The Commission argues that the Court of Special Appeals properly decided this question and asks us to affirm the judgment of the lower court. We note preliminarily that the relevant statutes do not expressly define the term "civil action," and that this Court has never definitively stated the meaning of the term in any decision.

However, there are many sources which have attempted to explain the meaning of the phrase. *Black's Law Dictionary* 311-12 (rev'd 4th ed. 1968) defines a civil action as:

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[7] Continued

of a physician for any crime involving moral turpitude within ten days after the conviction.

(c) *Subpoena power of Commission.* – The Commission may enforce this section by subpoena.

(d) *Immunity from civil action.* – A person who in good faith provides the information required under this section is immune from civil action for damages resulting from the provision of information.

(e) *Reports not subject to subpoena or discovery.* – A report made under this section is not subject to subpoena or discovery proceeding in any civil action except proceedings arising out of hearings and decisions of the Commission.

> [a]n action wherein an issue is presented for trial formed by averments of complaint and denials of answer or replication to new matter. . ., an adversary proceeding for declaration, enforcement or protection of a right, or redress, or prevention of a wrong. . . . Every action other than a criminal action. [citations omitted].

Poe's Pleading and Practice, § 46 (6th ed. H. Sachs 1970) provides that:

> [a] civil action may be defined to be a proceeding instituted in a court of law for the purpose of obtaining redress for a grievance in the shape of a judgment by the court. "Action" includes all the steps by which a party seeks to enforce any right in a court of law or equity and includes *an appeal taken to a court* of record from the final decision of an inferior court *or administrative body where such appeal is authorized by statute*. "Action" does not include a criminal proceeding. . . . . Until defined by the Maryland Rules the word "action" was inapplicable to suits pending in equity, the definition of the word being limited to those matters pending only before the law courts. [emphasis supplied].

While the case law discussing the term "civil action" in the context of a medical disciplinary proceeding is sparse, it tends to support the view that a medical disciplinary proceeding is a "special proceeding," not a civil action in the common law sense. The Supreme Court of Washington in *In re Kindschi*, 52 Wash.2d 8, 319 P.2d 824, 825-26 (1958) stated:

> It is somewhat difficult to classify a medical disciplinary proceeding. It is characterized as civil, not criminal, in nature; yet it is quasi criminal in that it is for the protection of the public, and is brought because of alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose. It is not strictly adversary in nature. It is essentially a *special*, somewhat unique, statutory proceeding, in which the medical profession (under state authorization through the medical disciplinary board) inquires into the conduct of a member of the profession and determines whether disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public. *Cf. In re Little*, 40 Wash.2d 421, 244 P.2d 255.

See also State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 P. 801 (1916).

Further, it would appear that a medical disciplinary proceeding does not fit the definition of a civil action (one for the enforcement or protection of a private right or for the redress or prevention of a private wrong) as espoused by courts in other jurisdictions. *E.g., Lee v. Lang*, 140 Fla. 782, 192 So. 490 (1940); *Gillikin v. Gillikin*, 248 N.C. 710, 104 S.E.2d 861 (1958); *Pearson v. State*, 159 Tex. 66, 315 S.W.2d 935 (1958); *State Board of Medical Examiners v. Macy, supra*.

The parties would have us equate disciplinary proceedings involving members of the legal profession with proceedings before administrative agencies citing *Anne Arundel Co. Bar*

Ass'n v. Collins, 272 Md. 578, 325 A.2d 724 (1974) (proceeding against attorney); *In Re Diener and Broccolino*, 268 Md. 659, 304 A.2d 587 (1973) (proceeding against judge); and *Braverman v. Bar Assn. of Balto.*, 209 Md. 328, 121 A.2d 473, *cert. denied*, 352 U.S. 830, 77 S.Ct. 44, 1 L.Ed.2d 51 (1956) (proceeding against attorney). We decline to do so, recognizing that such proceedings are peculiar to the legal profession the conduct of which is under the supervision of this Court. Our predecessors set forth the rationale for this distinction in *Braverman, supra* at 336:

> The action of a court in exercising its power to disbar or suspend an attorney is judicial in character, but the inquiry is in the nature of an investigation by the court into the conduct of one of its own officers, and is *not the trial of an action at law*, as the order which is entered is only an exercise of the disciplinary jurisdiction which a court has over its officers. [emphasis supplied].

We conclude, therefore, that as a fundamental principle a civil action is an adversary proceeding before a court of law; judicial review of the decision of an administrative agency is a civil action; a proceeding before the Commission is not a civil action unless the Legislature has clearly manifested an intention that it should be.

In any matter of statutory construction, the cardinal rule is to effectuate the actual intention of the Legislature. *Holy Cross Hosp. v. Health Services*, 283 Md. 677, 393 A.2d 181 (1978); *Mazor v. State, Dep't of Correction*, 279 Md. 355, 369 A.2d 82 (1977); *State v. Fabritz*, 276 Md. 416, 348 A.2d 275, *cert. denied sub nom Fabritz v. Maryland*, 425 U.S. 942, 96

S.Ct. 1680, 48 L.Ed. 2d 185 (1976); *Fairchild v. Maritime Air Serv.*, 274 Md. 181, 333 A.2d 313 (1975); *Purifoy v. Merc. - Safe Dep. & Trust*, 273 Md. 58, 327 A.2d 483 (1974); *Hagerstown v. Littleton*, 143 Md. 591, 123 A. 140 (1923); *M. & C. C. of Balto. v. Williams*, 129 Md. 290, 99 A.362 (1916); *Frazier v. Warfield*, 13 Md. 279 (1859). It is also an established principle that all statutory provisions which relate to the same subject matter and are thus in *pari materia* should be construed together and harmonized as far as possible. *Police Comm'r v. Dowling*, 281 Md. 412, 379 A.2d 1009 (1977); *Comm'n on Med. Discipline v. Bendler*, 280 Md. 326, 373 A.2d 1232 (1977); *Dep't of Nat. Resources v. France*, 277 Md. 432, 357 A.2d 78 (1976); *Demory Brothers v. Bd. of Pub. Works*, 273 Md. 320, 329 A.2d 674 (1974); *Bd. of Fire Comm'rs v. Potter*, 268 Md. 285, 300 A.2d 680 (1973); *May v. Warnick*, 227 Md. 77, 175 A.2d 413 (1961); *Plaza Corp. v. Alban*, 219 Md. 570, 151 A.2d 170 (1958); *Balto. Credit Union v. Thorne*, 214 Md. 200, 134 A.2d 84 (1957); *Hagerstown v. Littleton, supra; Smith v. Higinbothom*, 187 Md. 115, 48 A.2d 754 (1946); *Gregg v. Public Service Commission*, 121 Md. 1, 87 A. 111 (1913). In *May v. Warnick, supra*, the Court stated that:

> this rule applies when the statutes were passed at different dates, separated by long or short intervals. The statutes are to be compared and brought into full accord if possible, but if they are insusceptible of a construction which will permit all their provisions to fall into complete agreement, *they are to be made to operate together as far as possible, consistent with the evident intent of the latest enactment.* [227 Md. at 83 (emphasis supplied)].

See also Demory Brothers v. Bd. of Pub. Works, supra; Bd. of Fire Comm'rs v. Potter, supra; 2A Sutherland, *Statutory Construction*, § 51.02, at 290-91 (4th ed. C. Sands 1973) and cases cited therein.

Section 130(q) describes proceedings in which Commission records are not admissible as "a proceeding before the Commission or of any of its investigatory bodies." Certainly the Legislature did not intend to prevent the Commission from considering the proceedings and findings of a local medical society or a committee of the Medical and Chirurgical Faculty. If it were intended that the term civil should extend to the proceedings of the Commission or its subordinate investigatory bodies, the statute would have indicated that such records were inadmissible in criminal or *other* civil proceedings.

Section 134A(d) provides that the proceedings, records, and files of a medical review committee are not discoverable "in any civil action *arising out of* matters which are being reviewed and evaluated by the committee." [emphasis supplied]. A civil action which "arises out of" matters before a medical review committee cannot be equivalent to the matters out of which it arises. If they were equivalent then there could be no purpose in attempting to distinguish one from the other as the statute apparently does. The words "arising out of" in this context necessarily connote the development of one proceeding out of a different proceeding.

Section 130A(e) provides that a report made under that section is not subject to subpoena "in any civil action *except* proceedings arising out of hearings and decisions of the Commission." [emphasis supplied]. The very purpose of § 130A is to assure that the Commission obtains reports of physician misconduct for later use in disciplinary proceedings. The

exception provided for in § 130A(e) would be entirely superfluous if it were construed to pertain to those same proceedings. It is clear to us that if the Legislature intended that the exception apply to Commission proceedings it should have said "except proceedings of the Commission" rather than "except proceedings *arising out of* hearings and decisions of the Commission." [emphasis supplied].

Viewed in this light, it becomes manifest that the Legislature must have regarded the matters reviewed by a medical review committee as something other than a civil action. In this context it appears probable that the words "civil action" were intended to mean a tort action for medical malpractice. We conclude therefore that the subpoenaed materials are not statutorily protected from discovery.

We shall not entirely affirm the dicision of the Court of Special Appeals, however. While we agree with that court that § 130A should be considered in the resolution of this case,[8]

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[8] § 130A should be considered in the disposition of this case. An appellate court must apply the law which is in existence when a case is presented to it for decision, provided that application of any change in the law does not affect intervening vested rights and that the General Assembly has not shown a contrary intention. Co. Council v. Carl M. Freeman Assoc., 281 Md. 70, 376 A.2d 860 (1977); Rockvill Fuel v. Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972); Yorkdale v. Powell, 237 Md. 121, 205 A.2d 269 (1963); Tudor Arms Apts. v. Shaffer, 191 Md. 342, 62 A.2d 346 (1948); Cockerham v. Children's Society, 185 Md. 97, 43 A.2d 197 (1945); Wade v. St. Mary's Indust. School, 43 Md. 178 (1875); Day v. Day, 22 Md. 530 (1865).

we do not agree that § 130A(a)(3) insulates "minutes and notes" taken by the Hospital Committee from discovery by the Commission. We do not agree that the Commission is a "person."

Section 130A(a)(3) provides that "[i]n no event shall any minutes or notes taken in the course of determining the denial, limitation, reduction or termination of staff privileges be subject to review or discovery *by any person*." [emphasis supplied]. This Court has consistently held that the word "person" in a statute does not include the State, its agencies or subdivisions unless an intention to include these entities is made manifest by the Legislature. *St. Comm'n on Human Rel. v. Baltimore*, 280 Md. 35, 371 A.2d 645 (1977); *Harden v. Mass Transit Adm.*, 277 Md. 399, 354 A.2d 817 (1976); *M. & C. C. v. Balto. Gas Co.*, 232 Md. 123, 192 A.2d 87 (1963); *Huffman v. State Roads Commission*, 152 Md. 566, 137 A. 358 (1927).[9] The Court of Special Appeals found such an intention. That court recognized a legislative intent to insure the confidentiality of minutes and notes for the protection of the physician whose conduct was being evaluated. However, the court failed to answer the vital question which is: from whom are the minutes and notes protected?

We find in § 130A no manifestation of a legislative intention that the Commission be considered a "person." All the other provisions of § 130A seem to be designed to facilitate

[9]The Commission on Medical Discipline is an agency of the Department of Health and Mental Hygiene. Comm'n on Med. Discipline v. Bendler, 280 Md. 326, 373 A.2d 1232 (1977).

acquisition by the Commission of all possible findings and conclusions of a hospital committee. Sections 130A(a)(1) and (2) provided that hospital committees shall promptly report action taken concerning a physician's staff privileges and the reasons for such action to the Commission. Section 130A(b) requires courts to report convictions of physicians for crimes involving moral turpitude. Section 130A(c) allows the Commission to enforce these reporting requirements by subpoena. Section 130A(d) encourages testimony concerning a disciplinary matter by providing immunity from civil action for damages resulting from the provision of such information. To read § 130A(a)(3) as showing a legislative intent to consider the Commission a "person" and thus have the minutes and notes of a hospital committee fall outside the Commission's authority is plainly inconsistent with the evident intent of all the other subsections of § 130A. In addition, it would be incongruous to say that the Legislature intended to insulate minutes and notes from the Commission when the statute provides broad subpoena powers for the Commission to ascertain not only the action taken by a hospital committee, but also the reasons for that action, without regard to the type of source of that information, as in § 130A(c).

This reading of § 130A does not undermine the confidential nature of minutes and notes where that confidentiality is important. As we see it, the use of the term "person" in § 130A(a)(3) would prevent outsiders, such as former patients, from getting minutes and notes that relate solely to professional disciplinary proceedings. A more fundamental reason for preserving confidentiality in these proceedings is to ensure a high quality of peer review activity leading to the primary goal of this legislation – to provide better health care.

As such § 130A(a)(3) may be harmonized with § 130A (e). The only time a report made under § 130A would be discoverable would be when a physician is appealing from disciplinary action taken against him. Section 130A(e) states: "A report made under this section is not subject to subpoena or discovery proceeding in any civil action *except proceedings arising out of hearings and decisions of the Commission.*" [emphasis supplied]. The only proceeding we perceive arising out [of] a disciplinary decision is an appeal from Commission action. Thus a report would be insulated from discovery by a malpractice plaintiff, as would the "minutes and notes" and the "proceedings, records, and files" of the Hospital Committee.

We believe that our reading of § 130A(a)(3) is consistent with out obligation to harmonize, to the extent possible, different statutes related to the same subject matter. We hold, therefore, that the Commission may subpoena the "minutes and notes" of the Hospital Committee and that the "proceedings, records, and files" of the Committee are also discoverable.

Finally, the Physician claims that § 130 is unconstitutional because it denies him due process in that it fails to provide for formal notice of hearing and generally is void for vagueness. We find these contentions to be without merit. In the instant case the Commission proceedings had not reached a hearing stage requiring notice under Article 41, § 251 of the Administrative Procedure Act (Code 1957, 1971 Repl. Vol., 1978 Supp.), made applicable to the Commission by Art. 43, § 130(j). Here the Commission was exercising a quasi-legislative investigatory function where due process does not mandate a hearing. *Mont. Co. v. Woodward & Lothrop*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Williams v. Public Service Comm'n*, 277 Md. 415,

354 A.2d 437 (1976); *Chevy Chase Village v. Board*, 249 Md. 334, 239 A.2d 740 (1968); *Albert v. Pub. Serv. Commission*, 209 Md. 27, 120 A.2d 346 (1956).

We also conclude that § 130 is not void for vagueness. As we indicated initially, the statute informs a physician that if he engages in any of the acitivities forbidden by § 130(h) he will be subject to discipline and the possible loss of his license. This is plain language which can be understood by persons of ordinary intelligence. "That is all that is required of a statute in order to prevent it from being vague and indefinite in a constitutional sense." *Richards Furniture v. Board*, 233 Md. 249, 264, 196 A.2d 621 (1964). *See also Governor v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978); *Northampton Corp. v. Wash. S.S. Comm'n*, 278 Md. 677, 366 A.2d 377 (1976); *Bowie Inn v. City of Bowie*, 274 Md. 230, 335 A.2d 679 (1975); *Bd. of Co. Comm'rs v. Colgan*, 274 Md. 193, 334 A.2d 89 (1975); *Giant of Md. v. State's Attorney*, 267 Md. 501, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973). We therefore affirm that portion of the opinion of the Court of Special Appeals which holds that a proceeding before the Commission is not a "civil action" under Art. 43, § 134A(d) and reverse that portion which holds that the minutes and notes of the Hospital Committee are not discoverable by the Commission. The cause is hereby remanded to the Court of Special Appeals for proceedings consistent with this opinion.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED IN PART AND AFFIRMED IN PART; CASE REMANDED TO THAT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; APPELLANT TO PAY COSTS.

IN THE COURT OF APPEALS OF MARYLAND
No. 33
September Term, 1978

UNNAMED PHYSICIAN

v.

COMMISSION ON MEDICAL DISCIPLINE
OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Orth
Cole,
JJ.

Opinion by Murphy, C.J.,
concurring in part and
dissenting in part,
in which Orth, J., joins

Filed: April 23, 1979

Opinion by Murphy, C.J., concurring in part and dissenting in part

I fully agree with the Court that a proceeding before the Commission on Medical Discipline is not "civil action" within the meaning of Maryland Code (1957, 1978 Cum. Supp.), Article 43, § 134A. I do not, however, agree with the Court's holding that the Commission may, notwithstanding the provisions of § 130A(a)(3), subpoena "minutes or notes" taken by the Hospital Committee in the course of determining the denial, limitation, reduction or termination of a physician's staff privileges. Section 130A(a)(3) provides in no uncertain terms that such "minutes or notes" are not "subject to review or discovery by any person". Whether the Commission is a "person" within the meaning of that subsection can only be ascertained by considering § 130A in its entirety. That section mandates that certain required "reports" be filed with the Commission. It provides:

> "(a) Reports of denial, limitation or termination of staff privileges for unprofessional conduct; resignation while under formal accusation. – (1) Each hospital and related institution shall report to the Commission each denial of a physician's application for staff privileges and each limitation, reduction, or termination of previously granted staff privileges if the action results from any of the causes listed in § 130(h) of this article as unprofessional conduct, or any voluntary resignation of a physician while the physician is under formal accusation of activities listed in § 130(h) of this article.
>
> "(2) The report shall be submitted within ten days after the hospital or related institution acts on

the staff privileges and shall specify the reasons for the action.

"(3) In no event shall any minutes or notes taken in the course of determining the denial, limitation, reduction or termination of staff privileges be subject to review or discovery by any person.

"(b) Reports of convictions. – Each court shall report to the Commission each conviction of a physician for any crime involving moral turpitude within ten days after the conviction.

"(c) Subpoena power of Commission. – The Commission may enforce this section by subpoena.

"(d) Immunity from civil action. – A person who in good faith provides the information required under this section is immune from civil action for damages resulting from the provision of information.

"(e) Reports not subject to subpoena or discovery. – A report made under this section is not subject to subpoena or discovery proceeding in any civil action except proceedings arising out of hearings and decisions of the Commission. (1977, ch. 173.)"

In concluding that the Commission was not authorized to subpoena the notes or minutes, the Court of Special Appeals made these cogent observations:

"The parts of art. 43, § 130 A(a) are interrelated. Subsection (a)(1) requires that hospitals make certain reports to the Disciplinary Commission. Subsection (a)(2) specifies the

time of filing and content of the required report. Thus, the context of subsection (a) (3) requires it to be read as describing material which shall neither be included in the report nor otherwise made available to the Disciplinary Commission.

"The legislative history of art. 43, § 130 A (Senate Bill 263) shows that, as originally proposed, that Bill did not prohibit review or discovery of a hospital's minutes or notes concerning the status of a physician's staff privileges. A Senate Finance Committee Report, dated 28 February 1977, recommended, among other things, that the Bill be amended to include such a prohibition and that the Bill as amended be enacted. The report described the purpose of the proposed legislation as follows:

> 'The bill provides a means by which the Commission on Medical Discipline can learn of, and review each denial or reduction of a physician's staff privileges, and other occurrences of unprofessional conduct. *As amended, the bill also safeguards the rights of the accused by denying discovery of pertinent notes regarding the investigation of a physician.*' (Emphasis in original.)

"The Bill was enacted as amended.

"This history establishes that the purpose of subsection (a)(3) is to protect an accused physician from the disclosure of certain materials. To accomplish that purpose fully, subsection (a)(3) must be read as excluding minutes or notes concerning the status of a physician's staff privileges from the material which a hospital is otherwise required to make available to the Disciplinary Commission, a body authorized to impose sactions [sic] upon a physician for unprofessional conduct.

"Thus the context, the legislative history, and the purpose of art. 43, § 130 A(a)(3) establish a manifest legislative intent that the Disciplinary Commission be included in the word 'person.' We now consider the relation between that provision and other parts of the statute.

"Article 43, § 130(i) authorizes the Disciplinary Commission to issue subpoenas. It does not restrict the type of material which a hospital may be required to produce. Article 43, § 130 A(c), also authorizes the Disciplinary Commission to issue subpoenas. Article 43, § 130 A(a)(3), however, restricts the type of material which a hospital may be required to produce by excluding 'minutes or notes.' That section provides that '[i]n no event' shall those 'minutes or notes' be made available to the Disciplinary Commission. Under these circumstances, in order to harmonize and reconcile these three provisions, art. 43, § 130 A(a)(3) must be read as restricting the Disciplinary Commission's authority to compel the production of 'minutes or notes,' not only under art. 43, § 130 A(c), but also under art. 43, § 130(i). . . ." *Arthur E. Cocco et al. v. Maryland Commission on Medical Discipline*, 39 Md. App. 171, 384 A.2d 766.

I think it readily apparent that in excluding notes or minutes from Commission subpoena, the Legislature concluded that no need existed for their disclosure since the Hospital Committee was required to make an official report to the Commission of every case in which there was a denial, limitation, or termination of a physician's staff privileges. It undoubtedly recognized the desirability of keeping sacrosanct the notes taken by individual members of the Hospital Committee so as to encourage members freely to make notes of their impressions in the course of considering the issue. The minutes of the

Hospital Committee, which would to some extent record and be reflective of the views taken by each individual member were protected from disclosure for the same reason. Of course, if the notes or minutes were made part of the record before the Commission they would lose their confidential status and enter the public domain once an appeal was taken from the Commission's action. In stating that "in no event" should such material be subject to subpoena "by any person," the Legislature intended a literal application of that language, rather than a more limited technical, legal definition of the term "person." I would, therefore, affirm the judgment of the Court of Special Appeals.

Judge Orth authorizes me to state that he joins in this Opinion.

APPENDIX D

Code of Maryland, Article 43, Section 130

§130. Discipline of physicians.

(a) *Commission on Medical Discipline established as part of the Department of Health and Mental Hygiene membership.*— The Commission on Medical Discipline of Maryland is hereby established as part of the Department of Health and Mental Hygiene. It shall be hereafter referred to in this section as the Commission and shall consist of the following persons:

The president of the Medical and Chirurgical Faculty of the State of Maryland.

Two practicing physicians, appointed by the Secretary of Health and Mental Hygiene, selected from a list submitted by the Medical and Chirurgical Faculty of the State of Maryland, such list, having been composed from a list of nominees submitted by component societies of the Medical and Chirurgical Faculty and two other licensed practicing physicians of the State of Maryland appointed by the Secretary of Health and Mental Hygiene.

Three members of the Board of Medical Examiners to be selected by the Secretary of the Department of Health and Mental Hygiene.

The chairman of the council of the Medical and Chirurgical Faculty of the State of Maryland.

(b) *Quorum; office; rules and regulations; limitation on membership.*— Five of the nine members of the Commission are a quorum for the transaction of all business, except that for the Commission to suspend or revoke a license there must be five votes for suspension or revocation.

The Commission may establish and maintain an office within this State and shall make, adopt and promulgate rules and regulations for its own government and for the proper supervision and control of the professional conduct of all persons under its jurisdiction, as provided herein and not inconsistent with the laws of this State or of the United States.

There shall always be nine members, and no person shall serve in a dual capacity. If there are nominations which would lead to such an occurrence, the Secretary of Health and Mental Hygiene may designate a practicing physician from a list submitted by the Medical and Chirurgical Faculty of the State of Maryland, the list having been composed from a list of nominees submitted by component societies of the Medical and Chirurgical Faculty.

(c) *Terms of office.*— The terms of office for each appointee shall be for three years or until his successor is duly elected or appointed and qualified. Terms of office shall be from the first day of July each year, except when the initial appointments are made, and there shall be three persons for one year, three persons for two years, and three persons for three years.

(d) *Reports.*— The Commission shall make annual reports to the Secretary of Health and Mental Hygiene, the Board of Medical Examiners, and the Medical and Chirurgical Faculty of the State of Maryland.

(e) *Removal of members.*– Any member of the Commission may be removed by the Secretary of Health and Mental Hygiene, for neglect of duty, misconduct, or malfeasance or misfeasance in office.

(f) *Compensation.*– Members of the Commission shall receive no salary but may be reimbursed for expenses incurred in connection with their official dutes with the Commission in accordance with the standard travel regulations.

(g) *Referral of cases brought before Commission; investigation and report; initiation of action by State Medical and Chirurgical Faculty.* – (1) The Commission shall refer any cases coming to its attention to the appropriate local county society or committee of the Medical and Chirurgical Faculty of the State of Maryland, for investigation and report. The report shall be acted upon within 90 days unless there is a time extension granted by the Commission. The report shall contain recommendations the investigation reveals may be necessary for adequate disciplinary procedures. The recommendations shall then be considered by the Commission, which shall take whatever action it deems appropriate, as provided herein. All investigations, reports, and recommendations shall be considered confidential until such time as a final action is taken by the Commission.

(2) The Medical and Chirurgical Faculty of the State of Maryland may initiate action by virtue of information coming to its attention from its own members or through any other source, such cases being handled in the same manner as though they had been referred to it by the Commission.

(3) The investigating body as provided in paragraphs (1) and (2) of the subsection may request a physician to submit to an appropriate examination by a physician approved by the Commission. The expense of the examination shall be borne by the Commission. A physician who accepts the privilege of practicing medicine in this State and is duly licensed to practice medicine is deemed to have given his consent to submit to an examination when requrested in writing by the Commission, and to have waived all objections to the admissibility of the testimony or examination reports of the examining physician or physicians on the ground that the testimony or reports constitute a privileged communication. If a physician fails or refuses to submit to an examination under circumstances which the Commission finds are not beyond his control, the failure or refusal is prima facie evidence of his inability to practice medicine competently and in compliance with standards of acceptable and prevailing medical practice at any hearing before the Commission upon charges made against the physician under this section.

(4) To facilitate the investigation and prosecution of cases coming before it, the Commission may enter into contracts for the purchase of investigatory and related services and to make these services available to the Medical and Chirurgical Faculty of the State of Maryland, its committees, and local county medical societies. In addition, the Commission may enter into contracts with the Medical and Chirurgical Faculty of the State of Maryland, its committees, and local county medical societies, for the purchase from those organizations of investigatory and related services which shall include, but not be limited to, investigators, attorneys, accountants, expert witnesses, consultants, and the ordinary and reasonable expenses of the persons from whom these services may be purchased.

(h) *Powers of Commission; unprofessional conduct.*— When the Commission has completed its investigation according to the process outlined herein, it may reprimand a physician or place him on probation, revoke or suspend his license, or dismiss the charges against the physician for any of the causes listed below as unprofessional conduct:

(1) Fraudulent or deceptive procuring or use of a license.

(2) Solicitation or advertising contrary to §129 of this article.

(3) The performance of an abortion outside a licensed hospital.

(4) Conviction of a crime involving moral turpitude.

(5) Abandonment of a patient.

(6) Addiction to narcotics, habitual drunkenness or rendering professional services to patient if the physician is intoxicated or under the influence of drugs.

(7) Promotion by a physician of the sale of drugs, devices, appliances or goods provided for a patient in such a manner as to exploit the patient for financial gain of the physician.

(8) Immoral conduct of a physician in his practice as a physician.

(9) Willfully making and filing false reports or records, in his practice as a physician.

(10) Willful omission to file or record, or willfully impeding or obstructing a filing or recording, or inducing another person to omit to file or record medical reports required by law.

(11) Failure to furnish details of a patient's medical record to succeeding physicians or hospital upon proper request.

(12) Solicitation of professional patronage by agents or persons, or profiting from the acts of those representing themselves to be agents of the licensed physician.

(13) Division of fees or agreeing to split or divide the fees received for professional services with any person for bringing to or referring a patient.

(13-1) Agreeing with clinical or bioanyalytical laboratories to make payments to such laboratories for individual tests or test series for patients, unless the physician discloses on the bills to patient or third party payors the name of such laboratory, the amount or amounts paid to such laboratory for individual tests or test series and the amount of his procurement or processing charge, if any, for each specimen taken.

(14) Willful misrepresentation in treatments.

(15) Practicing medicine with an unauthorized person except in an accredited preceptorship or residency training program; or aiding or abetting unauthorized perons in the practice of medicine.

(16) Gross and willful and continued overcharging for professional services; including filing of false statements for collection of fees for which services are not rendered.

(17) Offering, undertaking or agreeing to cure or treat disease by a secret method, procedure, treatment or medicine.

(18) Professional, physical, or mental incompetency.

(i) *Subpoenas; oaths.*– The Commission may issue subpoenas and administer oaths in connection with any investigation, hearing, or proceeding under this section.

(j) *Hearing before Commission; right to counsel.*– Any physician who has a case referred to the Commission on Medical Discipline may appear in person before the Commission at a hearing duly convened to consider the case, at which time he may be represented by counsel; all proceedings of the Commission shall be subject to the provisions of the Administrative Procedures Act in Article 41 of this Code.

(k) *Procedure upon finding of guilty.*– If a majority of the members of the Commission find the accused guilty of unprofessional conduct as specified in the charges, the Commission shall prepare written finding of fact and may thereafter prepare and file in the office of the Board of Medical Examiners a certificate or order of revocation, suspension, or reprimand, in which case notice thereof shall be served upon the accused forthwith.

(l) *Procedure upon finding of not guilty.*– If the license holder is found not guilty, the Commission forthwith shall order a dismissal of the charges and the exoneration of the accused, and no further action may be taken by the Commission on the charges involved. After a finding of not guilty, the Commission shall expunge all records about it.

(m) *Revocation or suspension of license; no stay pending judicial review.*– The filing by the Commission in the office of the Board of Medical Examiners of a certificate or order of revocation or suspension, after due notice, hearing and findings in accordance with the procedure specified in this section, certifying that any holder of a license has been found guilty of unprofessional conduct by the Commission shall constitute a revocation or suspension of the license to practice medicine and surgery in this State in accordance with the terms and conditions imposed by the Commission and embodied in the certificate or order of revocation or suspension. If the licensee seeks judicial review of the Commission's decision pursuant to the provisions of this section, the revocation or the period of suspension shall not be stayed and shall be effective or commence to run immediately, except this shall not apply to any decision made prior to July 1, 1974, in which case the revocation or suspension shall be stayed until final judgment. The Board, upon suspension or revoation which has become final, shall require that the license be surrendered to and retained by the Board, but upon termination of the period of suspension the license shall be returned to the licensee.

(n) *Contents of certificate or order of revocation or suspension; retention as permanent record.* – The certificate or order of revocation or suspension shall contain a brief and concise statement of the ground or grounds upon which the certificate or order is based and the specific terms and conditions of the revocation or suspension, and shall be retained as a permanent record by the Board of Medical Examiners as well as by the Commission.

(o) *Issuance or renewal of license after revocation or suspension.*– The Board of Medical Examiners shall not issue any license or any renewal thereof to any person whose license

has been revoked or suspended by the Commission except in conformity with the terms and conditions of the certificate or the order of revocation or suspension, or in conformity with any order of reinstatement issued by the Commission or in accordance with the final judgment in any proceeding for review.

(p) *Appeal.*– Any person whose license has been revoked or suspended by the Commission or any person reprimanded or placed on probation under this section, may have a judicial review of the Commission's decision. He may enter an appeal to the Baltimore City Court, or in the circuit court in the county in which the charges originated or in which the physician maintains his principal office and serve notice of the appeal on the Commission within 30 days after the filing of the certificate or order of revocation, suspension, probation, or reprimand. The Commission has a right of appeal to the Court of Special Appeals of Maryland from any order of the Baltimore City Court or of the circuit court of any county which order shall reverse or modify any order of the Commission or shall remand any matter to the Commission.

(q) *Admissibility in evidence of Commission's records.*– The records of any proceeding before the Commission or of any of its investigatory bodies or any order passed by the Commission may not be admitted into evidence in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records or any other exhibit in any other proceeding, provided that the medical records, hospital records, or any other exhibit is legally subpoenaed and is otherwise admissible.

(r) *Examption of Commission members and other from civil liability.*– A member of the Commission and any person who makes a complaint to the Commission or who investigates or prosecutes the complaint on its behalf is not liable to any person in any civil proceeding on account of having made the complaint, investigated the complaint, prosecuted the complaint, heard the complaint or acted upon the complaint, provided that such member of the Commission or other person enumerated herein did not act with malice.
(1971, ch. 525; 1972, ch. 47; 1974, ch. 734; 1975, chs. 168, 688, 700; 1976, chs. 139. . .

§ 130A. Required reports to Commission by hospitals and courts.

(a) *Reports of denial, limitation or termination of staff privileges for unprofessional conduct; resignation while under formal accusation.*– (1) Each hospital and related institution shall report to the Commission each denial of a physician's application for staff privileges and each limitation, reduction, or termination of previously granted staff privileges if the action results from any of the causes listed in § 130(h) of this article as unprofessional conduct, or any voluntary resignation of a physician while the physician is under formal accusation of activites listed in § 130(h) of this article.

(2) The report shall be submitted within ten days after the hospital or related institution acts on the staff privileges and shall specify the reasons for the action.

(3) In no event shall any minutes or notes taken in the course of determining the denial, limitation, reduction or termination of staff privileges be subject to review or discovery by any person.

(b) *Reports of convictions.*– Each court shall report to the Commission each conviction of a physician for any crime involving moral turpitude within ten days after the conviction.

(c) *Subpoena power of Commission.*– The Commission may enforce this section by subpoena.

(d) *Immunity from civil action.*– A person who in good faith provides the information required under this section is immune from civl action for damages resulting from the provision of information.

(e) *Reports not subject to subpoena or discovery.*– A report made under this section is not subject to subpoena or discovery proceeding in any civil action except proceedings arising out of hearings and decisions of the Commission. (1977, ch. 173.)

Editor's note.– Section 2, ch. 173, Acts 1977, provides that the act shall take effect July 1, 1977.

§134A. Medical review committees.

(a) *Definitions.*– (1) In this section the following words have the meanings indicated.

(2) *"Medical review committee"* means a committee or board described in subsection (b) of this section, which is engaged in carrying out one or more of the functions described in subsection (c) of this section; and

(3) *"Provider of health care"* means any individual or organization licensed by law to provide health care to human beings, and it may not be construed to mean any

nursing institution conducted by and for those who rely upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious demonination.

(b) *What constitutes a medical review committee.*– The medical review committee is a committee or board described as follows:

(1) A regulatory board or agency created by State or federal law to license, certify or discipline any provider of health care; or

(2) A committee of the Medical and Chirurgical Faculty of this State and its component societies or a committee of any other profession society or association comprised of licensed providers of health care; or

(3) A committee of the medical staff or other committee of a "hospital" or "related institution" as defined under this article if the committee was formed and approved by the governing board of the hospital or related institution, or the committee operates pursuant to written bylaws that have been approved by the governing board of the hospital ror related institution; or

(4) Any individual or organization contracting with an agency of the State or federal government (such as a professional standard review organization) to perform any of the functions described in subsection (c) of this section; or

(5) Any individual or organization contracting with a provider of health care to perform any of the functions described in subsection (c) of this section if the functions are limited to review of services provided by the provider of heath care.

(6) Any committee appointed or established in a local health department for review purposes.

(c) *Functions of medical review committee.*– The medical review committee shall engage in one or more of the following functions:

(1) Evaluating and improving the quality of health care rendered by providers of health care;

(2) Evaluating the need for and the level of performance of health care rendered;

(3) Evaluating the qualifications, competence and performance of providers of health care; and

(4) Evaluating and acting upon matter relating to the discipline of any individual provider of health care.

(d) *Confidentiality of proceedings, records, and files of committee.*– The proceedings, records, and files of a medical review committee are neither discoverable nor admissible into evidence in any civil action arising out of matters which are being reviewed and evaluated by the committee. This immunity does not apply to a civil action brought by a party to the proceedings of the review committee and claiming to be aggrieved by the decision of the

committee. Also, this immunity does not extend to any records or documents considered by the committee which would otherwise be subject to discovery and introduction into evidence in a civil action.

(e) *Immunity from liability for damages.*– A medial review committee, individual members of a committee, or any person (1) providing information to, (2) participating in, or (3) contributing to the function of a committee are immune from liability for damages from their activity if their actions are taken in good faith and within the scope of the committees' jurisdiction.

(f) *Application of subsection (q) and (r) of §130.*– Notwithstanding the foregoing provisions of subsections (d) and (e) of this section, the provision of subsections (q) and (r) of Article 43, §130, shall apply with respect to the Commission on Medical Discipline and to other bodies to the extent that they act in an investigatory capacity with respect to that Commission. (1976, ch. 722.)

Editor's note.– Section 3, ch. 722, Acts 1976, provides that the act shall take effect July 1, 1976.

APPENDIX E

JURISDICTIONAL FACTS

Circuit Court for Baltimore County

MEMORANDUM IN BEHALF OF UNNAMED PHYSICIAN

The statute creating the Commission on Medical Discipline (hereinafter "the Commission") is so vague, unlimited, indefinite, capricious and contradictory and its meaning so uncertain, that its enforcement would violate the due process clause of the Fourteenth Amendment and the patients' right of privacy.

Court of Special Appeals of Maryland
September Term, 1977

BRIEF OF UNNAMED PHYSICIAN – APPELLANT

QUESTIONS PRESENTED

Page 2

2. Does the enforcement of the subpoena violate the due process clause of the Fourteenth Amendment of The Constitution of the United States?

Court of Appeals of Maryland
September Term, 1978

BRIEF OF UNNAMED PHYSICIAN – APPELLANT

QUESTIONS PRESENTED

Page 3

2. Does the subpoena power granted the Commission provide unlimited access to the records and files of St. Joseph Hospital and to its medical review committee?

3. Does Article 43, Section 130 of the Annotated Code of Maryland violate the due process clause of the Fourteenth Amendment of The United States Constitution?

Page 20

II.

THE SUBPOENA POWER GRANTED THE COMMISSION DOES NOT PERMIT UNLIMITED ACCESS TO THE RECORD AND FILES OF ST. JOSEPH HOSPITAL.

A. THE COMMISSION'S SUBPOENA THREATENS THE CONSTITUTIONAL RIGHT TO PRIVACY OF THE PATIENTS INVOLVED.

Although a right to privacy is not expressly stated in the Constitution of the United States, the Supreme Court has long "recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the constitution." *Roe v. Wade*, 410 U.S. 113, 152; 35 L. Ed. 2d 147, 176; 93 S. Ct. 705. The Supreme Court has noted that the right of privacy involves at least two different interests: "one in avoiding disclosure of personal matters and another is the interest

in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600, 51 L. Ed. 2d 73; 97 S. Ct. 869. The first interest is involved in the instant case.

. . .

Page 22

B. THE COMMISSION HAS FAILED TO DEMONSTRATE A SUFFICIENT INTEREST TO JUSTIFY INTERFERENCE WITH PATIENTS' RIGHT TO PRIVACY.

Individuals' right to privacy is not, of course, absolute, but can be subject to governmental regulation and intervention. The standard for permitting such intervention is set forth in *Roe v. Wade, supra*.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest", and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (410 U.S. at 155 (citations omitted)).

Appellee will undoubtedly submit that its statutory responsibility to investigate and discipline physicians is a sufficient "compelling state interest". The contention has some surface appeal, but upon closer scrutiny fails.

. . .

Page 23

III.

ARTICLE 43, SECTION 130 OF THE ANNOTATED CODE OF MARYLAND VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Statute creating the Commission is so vague, unlimited, indefinite, capricious and contradictory and its meaning so uncertain that its enforcement would violate the due process clause of the Fourteenth Amendment and the patients' right of privacy.

. . .

Supreme Court, U.S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-109

THE UNNAMED PHYSICIAN,
Petitioner,

v.

MARYLAND COMMISSION ON MEDICAL DISCIPLINE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	3
I. The Decision Of The Court Of Appeals Is Consistent With This Court's Decisions Regarding Patient's Privacy Rights	4
II. The Decision Of The Court Of Appeals Is Consistent With This Court's Due Process Decisions	8
CONCLUSION	14

TABLE OF CITATIONS

Cases

Albert v. Public Service Commission, 209 Md. 27, 120 A.2d 346 (1946)	12
Banach v. State Commission on Human Relations, 277 Md. 502, 356 A.2d 242 (1976)	12
Bell v. Burson, 402 U.S. 535 (1971)	12
Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 866 (1961)	12
Casey Development Co. v. Montgomery County, 212 Md. 138, 129 A.2d 63 (1957)	11
Dixon v. State Board of Optometric Examiners, 565 P.2d 960 (Colo. 1977)	12
In re Easton, 214 Md. 176, 133 A.2d 441 (1957)..	12
Ferguson v. United parcel Service, 270 Md. 202, 311 A.2d 220 (1973) *cert. den.* 415 U.S. 1000 (1974)	12
Kimbrough v. Giant Foods, Inc., 26 Md. App. 640, 339 A.2d 688 (1975)	11

PAGE

Montgomery County v. Woodward & Lothrup, 280 Md. 686 (1977) *cert. den.* 434 U.S. 1067 (1978) 12
O'Brien v. State, 126 Md. 270, 94 A. 1034 (1915) 7
Roe v. Wade, 410 U.S. 113 (1973) 4
Union Investors Inc. v. Montgomery County, 244 Md. 585, 224 A.2d 453 (1966) 12
Whalen v. Roe, 429 U.S. 589 (1977) 4, 5, 6, 7, 8
Withrow v. Larkin, 421 U.S. 35 (1975) 12

Statutes

United States Code:
28 U.S.C. § 1257 1
Annotated Code of Maryland:
Article 41 § 244 *et seq.* 11
Article 41 § 255 11
Article 43 § 54L 7, 8
Article 43 § 130 ..... *passim*
Article 43 § 130(g) 6, 9, 10, 13
Article 43 § 130(p) 11
Article 43 § 130(q) 6, 9, 10, 11
Article 43 § 130A 3
Article 43 § 134A 3, 11
Article 48A § 354M 7
Article 76A § 3(b)(i) 10
Article 76A § 3(c)(i) 6, 10
Courts Article § 9-109 ..... 7, 8

Constitutional Provisions

Fourteenth Amendment of the United States Constitution 2

Rules

Maryland Rules of Procedure:
Rule B1 *et seq.* 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-109

THE UNNAMED PHYSICIAN,
Petitioner,

v.

MARYLAND COMMISSION ON MEDICAL DISCIPLINE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals of Maryland reported at 285 Md. 1, 400 A.2d 396 (1979).

JURISDICTION

Petitioner states that this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). Respondent believes that this is incorrect and that the basis for this Court's jurisdiction is 28 U.S.C. §1257(2). The other statements set forth in the Petitioner's jurisdictional statement are adopted by the Respondent.

QUESTIONS PRESENTED

1. Does Article 43, § 130 of the Annotated Code of Maryland which establishes the Commission on Medical Discipline of Maryland and empowers that agency to take disciplinary action against licensed physicians violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Assuming that records of an in-hospital physician review committee contain information regarding patients, would compliance with a subpoena issued by the Commission on Medical Discipline of Maryland for such records violate a patient's right of privacy?

STATEMENT OF THE CASE

The Commission on Medical Discipline of Maryland (the "Commission") is an agency of the State of Maryland responsible for taking disciplinary action against physicians licensed in Maryland when it deems such action is appropriate. The Commission is composed of nine members, each of whom is a practicing physician. Article 43, § 130 of the Annotated Code of Maryland sets forth nineteen separate grounds upon which the Commission may discipline a physician. This provision also requires that the Commission refer all complaints to a committee of the state medical society or to a county medical society for investigation, report and recommendation.

Pursuant to a complaint, the Commission initiated an investigation into Petitioner's medical practice. In connection with this investigation the Commission issued subpoenas to Frank W. Baker, Jr., M.D., President of the Medical Staff, St. Joseph Hospital, Arthur C. Cocco, M.D., Chief of Medicine, St. Joseph Hospital, and Sister Marie Cecelia, to obtain records and testimony concerning the privileges and practices of the Petitioner at St. Joseph Hospital. After being advised that its subpoenas would not be obeyed, the

Commission, on October 26, 1976, petitioned the Circuit Court for Baltimore County, Maryland for enforcement of its subpoenas. Sister Marie Cecelia was not joined in that action since counsel for St. Joseph Hospital and Drs. Cocco and Baker had previously informed the Commission that the materials, information and testimony requested were under the control of Drs. Cocco and Baker.

Following the successful intervention by the Petitioner, Judge H. Kemp MacDaniel, (now an Associate Judge of the Court of Special Appeals of Maryland), by Order dated May 4, 1977, granted the Commission's petition. Judge MacDaniel held that "proceedings, records and files" of a medical review committee which Article 43, § 134A(d) of the Annotated Code of Maryland generally protects from discovery were subject to the Commission's subpoena power.

On appeal by both the Petitioner and Drs. Cocco and Baker, the Court of Special Appeals of Maryland concurred with the Circuit Court's decision. However, the Circuit Court decision was reversed and remanded on the ground that the subsequent enactment of Chapter 173, Laws of Maryland, 1977, codified as Article 43, § 130A of the Annotated Code of Maryland, insulated "minutes" and "notes" from the Commission's subpoena power and required a modification of the subpoenas issued to Drs. Cocco and Baker.

Upon a writ of certiorari issued to the Petitioner, the Court of Appeals of Maryland affirmed the judgment of the Court of Special Appeals in part and reversed it in part, reinstating the Order of the Circuit Court enforcing the Commission's subpoenas.

REASONS FOR DENYING THE WRIT

The Court of Appeals of Maryland held that materials developed in an in-hospital physician review proceeding are subject to the Commission's subpoena

power. Petitioner asks this Court to review this decision for two reasons. First, he claims that this result violates a patient's right of privacy. Second, he believes that the system established in Maryland for investigating and disciplining licensed physicians violates due process. No authority is cited as support for Petitioner's claims. Analysis of this Court's prior decisions rejecting similar claims demonstrates that the Court of Appeals' decision is correct. Moreover, review of the Court of Appeals' decision indicates that the central issue in this case is the interpretation of Maryland statutes dealing with Commission access to in-hospital physician review committee records. For these reasons, this case does not merit review by this Court.

I.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS REGARDING PATIENT'S PRIVACY RIGHTS.

The lower court held that materials developed in an in-hospital physician review proceeding are subject to the Commission's subpoena power. Petitioner claims that the release of such information would violate a patient's right to privacy. While Petitioner professes concern for patient's rights, his real interest is the "sanctity" of the in-hospital physician review process. Analyzing Maryland statutes, the Court of Appeals found that the general protection agninst discovery and admissability of in-hospital physician review activities is not applicable to the Commission. In his brief, Petitioner criticizes the Court of Appeals' interpretation of Maryland law. Such an argument is, of course, not properly addressed to this Court. However, Petitioner seizes upon the privacy claim in an attempt to achieve through the back door what he cannot obtain through the front.

Petitioner cites *Roe v. Wade*, 410 U.S. 113 (1973), and *Whalen v. Roe*, 429 U.S. 589 (1977), arguing that

compliance with the Commission's subpoenas would violate a patient's constitutional right of privacy. Apart from Petitioner's assumption that the materials subpoenaed by the Commission will include patient records, a fact not altogether clear from the record, Petitioner's reliance upon *Whalen v. Roe, supra* is misplaced.[1] In *Whalen*, this Court considered a New York statute which required physicians who prescribed Schedule II drugs[2] to forward a copy of the prescription to the New York State Department of Health. Prescriptions for Schedule II drugs had to be written on an official form which required identification of the prescribing physician, dispensing pharmacy, drug and dosage, and the patient's name, address and age. Upon receipt, the State Department of Health recorded this data on computer tapes. Public disclosure of this material was statutorily prohibited and access was limited to certain health department and investigatory personnel. Reversing a lower court decision, Justice Stevens, speaking for an unanimous Court, upheld the reporting requirement. He stated:

> Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.
>
> * * *
>
> We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

[1] For the reasons set forth below, this brief does not address the issue of Petitioner's standing to assert a patient's constitutional right of privacy.

[2] Schedule II is a classification of drugs which includes the most dangerous of the legitimate drugs which may be prescribed. Included are such drugs as opium, cocaine, methadone, amphetamines and methaqualone.

> Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.
>
> The third possibility existed under the prior law and is entirely related to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. *And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarrranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.* (footnotes omitted) (emphasis added) Id. at 598-602.

In the instant case, the only way in which a patient's records will be subject to public disclosure is if they are introduced in a Commission proceeding and become part of the record on appeal.[3] There are many ways in which a court can protect patient records from public disclosure (i.e. sealing the record, *in camera* proceedings). Petitioner assumes that judicial supervision will be inadequate protection against unwarranted disclosures. Such a claim was explicitly rejected by this Court in *Whalen*. Therefore, it is clear that the Maryland system for disciplinary physicians set forth in Article

[3] Article 43, § 130(q) states that Commission records are inadmissible in civil or criminal actions; Article 43, § 130(g) makes materials developed in Commission investigations confidential until the Commission takes final action; and Article 76A, § 3(c)(i) prohibits the Commission from releasing medical data.

43, Section 130, like the reporting system considered in *Whalen*, is facially constitutional.

Moreover, the Supreme Court in *Whalen* recognized that privacy interests must give way to the need for disclosure of patient record to regulatory agencies such as the Commission. Justice Stevens stated:

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care . . . . [*D*]*isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.* (footnotes omitted) (emphasis added) *Id.* at 602.

The Commission needs patient medical records to fulfill its public duties. When this interest is coupled with the fact that the materials obtained receive adequate protection from public disclosure, it is clear that the constitutional right of privacy is not violated by disclosure of patient medical records to the Commission.

It is also important to note that the Maryland legislature has recognized the need for protection of patient medical records by enacting Chapter 728, Laws of Maryland, 1978, codified as Article 43, § 54L and Article 48A, § 354M.[4] This statute provides generally

[4] In Maryland, there is no common law physician-patient privilege. *O'Brien v. State,* 126 Md. 270, 94 A. 1034 (1915). Communications between a psychiatrist or a psychologist and a patient are, however, protected. Section 9-109 of the *Courts* Article, Annotated Code of Maryland.

that providers of medical care and nonprofit health service plans may not reveal patient medical records to "any person" unless an authorization is received from the patient. However, the Commission is exempt from this provision either as a "governmental agenc[y]" performing its lawful duties under Article 43, § 54L(c)(4) and Article 48, § 354(c)(4) or as a "medical review committee" under Article 43, § 54L(c)(2) and Article 48, § 354(c)(2). The Maryland legislature in this statute, like this Court in *Whalen*, balanced the patient's desire for privacy against the Commission's need for information and determined that public interest requires that the Commission receive patient medical records. If Petitioner's claim of privacy protection is accepted, not only will this statute fall, but the Commission's ability to effectively pursue its statutory purpose will be severly hampered, if not completely destroyed.

II.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DUE PROCESS DECISIONS.

Petitioner also claims that Article 43, § 130 which establishes the Commission and sets forth its procedures is unconstitutionally vague. He contends (i) that the provisions relating to confidentiality are "confusing and conflicting," (ii) that there is no opportunity to respond to charges in an informal way, (iii) that the provisions dealing with judicial review are confusing, (iv) that the physician is given no notice of a complaint or investigation and (v) that there is no limitation on the Commission's power to delegate investigative responsibility because of the Commission's power to contract for the provision of these services. The Court of Appeals rejected these claims. That decision was correct and need not be reviewed by this Court.

Although the Petitioner contends that the alleged defects render the statute void for vagueness, it is clear that many of his assertions involve, instead, claims of alleged procedural defects in the statute. In fact, the only two contentions that seem to fall within the rubric of "void for vagueness" are his assertions that the provisions relating to confidentiality and judicial review are confusing.

There are two specific sections in Article 43, § 130 which may be characterized as confidentiality provisions.

Article 43, § 130(g) states in pertinent part:

> All investigations, reports and recommendations shall be considered *confidential* until such time as a final action is taken by the Commission. (emphasis added)

Article 43, § 130(q) states:

> The records of any proceeding before the Commission or any of its investigatory bodies or any order passed by the Commission may not be *admitted into evidence* in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible. (emphasis added)

It is hard to see how these sections are at all confusing or conflicting. The former section provides that "investigations, reports and recommendations" shall be "confidential" until the Commission takes final action. Following the receipt of a report and recommendation from an investigatory body, the Commission has several options. It may determine to charge the physician, hold a hearing and take whatever disciplinary action it deems appropriate if it finds the

physician guilty of the charges alleged. Alternatively, the Commission may decide that based on the investigation conducted, no action should be taken against the physician in question. Pn such cases, no charges are filed, no hearing held and no findings of fact and conclusions of law made. Regardless of the course of action taken, it is clear that a final action results, and Section 130(g) confidentialty ends, either when the Commission enters its order following a disciplinary hearing or when it determines not to file charges against the physician who was investigated.[5] This result is completely consistent with Article 43, § 130(q), which provides that records of Commission proceedings and investigations and Commission orders are not admissible in civil or criminal proceedings. Petitioner confuses the Section 130(g) *confidentiality* of "investigations, reports and recommendations" which applies only prior to a final decision by the Commission with the Section 130(q) *inadmissibility* of Commission records and orders in civil and criminal actions. Recognizing the different focus of Article 43, §§ 130(g) and (q), it is hard to see how these provisions are at all inconsistent or unclear.[6]

Petitioner also argues that Article 43, § 130(q) renders the record of a disciplinary proceeding before the Commission and the Commission's order inadmissible in an appeal of a Commission decision. This claim presents an issue of State law that was decided by the

[5] In cases in which no charges are filed the Commission notifies the complaining party and the physician being reviewed of the results of the investigation.

[6] It should be noted that even after the Commission takes final action under Article 43, § 130(g), public access to Commission files is denied pursuant to Article 76A, §§ 3(b)(i) and 3(c)(i). Section 3(b)(i) permits the Commission to deny access to investigatory files; Section 3(c)(i) requires that the Commission keep medical data contained in its files confidential at all times.

Courts of Appeals. Hence, this issue is not properly before this Court.

However, if the Court considers this contention, it is clear that the Maryland legislature could not have intended such a result. Petitioner's reading of this section renders the physician's statutory appeal rights under Article 43, § 130(p) and Article 41, § 255 nugatory, a result which would unquestionably be a due process violation. The Court of Appeals refused to accept a construction of Article 43, § 130(q) which would yield this unconstitutional result. Indeed, Petitioner's construction of Article 43, § 130(q) is inconsistent with his own goals. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Casey Development Co. v. Montgomery County*, 212 Md. 138, 129 A.2d 63 (1957). If a statute is capable of more than one construction, it should be given the reading that will effectuate or carry out its purpose. *Kimbrough v. Giant Foods, Inc.*, 26 Md. App. 640, 339 A.2d 688 (1975). The purpose of Article 43, § 130(q), like the purpose of Article 43, § 134A, is to encourage physicians to participate in the peer review process without fear that discussions of their colleagues will fall into the hands of malpractice plaintiffs. The legislature, in enacting these provisions, recognized that this process would be inhibited if this protection were not afforded. Even if the physician appeals a Commission decision, the record upon which the appeal is based is still inadmissible in a malpractice action. Article 43, §§ 134A(d) and 130(q). Accordingly, analysis of Article 43, § 130(q) indicates quite clearly that the legislature, in utilizing the term "civil," could not have intended that this provision apply to an appeal of a Commission decision.[7]

[7] A reading of this section in connection with Article 41, § 244, *et seq.* (Maryland Administrative Procedures Act) and the Maryland Rules of Procedure, Rule B1, *et seq.*, further indicates that the legislature could not have intended appeals of Commission decisions to be included in Article 43, § 130(q).

The remaining deficiencies alleged by Petitioner, though placed under the rubric of void for vagueness, upon closer analysis, constitute claims that Article 43, § 130 violates procedural due process. Although in the administrative context due process does not require any particular form of proceeding, the minimum requirements necessary to survive a due process attack are jurisdiction, adequate notice and a fair hearing. *Withrow v. Larkin,* 421 U.S. 35 (1975), *Bell v. Burson,* 402 U.S. 535 (1971). *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961); *Union Investors, Inc. v. Montgomery County,* 244 Md. 585, 224 A.2d 453 (1966); *In re Easton,* 214 Md. 176, 133 A.2d 441 (1957); *Albert v. Public Service Commission,* 209 Md. 27, 120 A.2d 346 (1946). Petitioner asserts that due process requires an opportunity to respond to a complaint in an informal way and notice of a complaint or investigation. Petitioner further argues that there is no limitation on the Commission's power to delegate investigatory responsibility.

Petitioner cites no authority, and none can be found, which asserts that it is constitutionally required that a physician be notified of a complaint or investigation[8] or be afforded an opportunity to respond to a complaint in an informal way. Indeed, the Court of Appeals correctly held that it is at the adjudicatory stage of administrative proceedings that a party must be afforded notice of charges and an opportunity to be heard. *Montgomery County v. Woodward & Lothrup,* 280 Md. 686, 376 A.2d 483 (1977), *cert. den.* 434 U.S. 1067 (1978). *Banach v. State Commission on Human Relations,* 277 Md. 502, 356 A.2d 242 (1976) *Ferguson v. United Parcel Service,* 270 Md. 202, 311 A.2d 220 (1973), *cert. den.* 415 U.S. 1000 (1974). Although not required in actual practice,

[8] In *Dixon v. State Board of Optometric Examiners,* 565 P.2d 960 (Colo. 1977) the Supreme Court of Colorado held that due process does not require two notices — one at a time of the initiation of the proceeding and one at the time of the hearing.

both the committee conducting the investigation and the Commission often afford a physician the opportunity to meet informally to discuss the complaint and its investigation.[9]

Petitioner's final assertion is that the Commission's power to delegate investigatory responsibility is unconstitutionally broad because of its power to contract for investigatory services. Article 43, § 130(g)(1) requires that the Commission refer a complaint to a committee of the state medical society or to a local component society for investigation. Article 43, § 130(g)(4) which permits the Commission to contract for investigative services, merely facilitates the investigation mandated by Section 130(g)(1). Article 43, § 130(g)(4) states in pertinent part:

> To facilitate the investigation and prosecution of cases coming before it, the Commission may enter into contracts for the purchase of investigatory and related services and to make these services available to the Medical and Chirurgical Faculty of the State of Maryland, its committees, and local county medical societies.

Clearly, Article 43, § 130(g)(4) does not give the Commission the unlimited power to delegate its investigative functions. Even if one posits that an overly broad delegation of the power to investigate complaints would constitute a constitutional violation, this is certainly not the case when one considers the statutory provisions relating to the powers of the Commission.

[9] In the instant case, Petitioner met with the Baltimore City Medical Society to review the complaint and with the Commission on an informal basis to discuss the alleged difficulties.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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